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**HEARING DIVISION PROPOSED AMENDMENT #1**

DATE PREPARED: June 19, 2006

COMPANY: Pac-West v. Qwest

AGENDA ITEM NO. \_\_\_\_\_

DOCKET NO.: T-01051B-05-0495 et al.

OPEN MEETING DATE: June 27 and 28, 2006

T-03693A-05-0495

**Page 3, between lines 6 and 7, insert:**

“On April 13, 2006, a Recommended Opinion and Order was issued.

On April 20, 2006, Qwest filed a Motion for an Order Suspending the Recommended Opinion and Order, and for Additional Briefing, with Request for Expedited Consideration.

On April 21, 2006, Pac-West filed a Response to Qwest’s Motion.

On April 24, 2006, Qwest filed Exceptions to the Administrative Law Judge’s Recommended Opinion and Order. On this day Staff filed a Motion for Clarification of the Recommended Opinion and Order. Pac-West responded to Staff’s Motion on May 16, 2006.

On April 25, 2006, by procedural order, the parties were ordered to provide supplemental legal briefing regarding *Global NAPs v. Verizon New England*, 2006 WL 924035 (1<sup>st</sup> Cir., April 11, 2006).

On May 10, 2006, the parties filed supplemental briefs.

On May 16, 2006, Qwest filed a Reply to Supplemental Brief of Pac-West Telecom.

On May 17, 2006, Level 3 Communications filed Comments Regarding the *Global NAPs* Decision in this docket.

On May 22, 2006, Qwest filed a Motion to Strike Level 3’s Comments.

On May 30, 2006, a letter from Pac-West’s President and CEO, Hank Carabelli, was docketed.

On June 2, 2006, a letter from Qwest's State President, Patrick J. Quinn, was docketed.

On June 15, 2006, a procedural order was issued granting Qwest's motion to strike Level 3's comments in this docket."

**Page 6, between lines 7 and 8, insert:**

"In its Supplemental Brief, Pac-West addressed the impact of the *Global NAPs* decision (2006 WL 924035 (1<sup>st</sup> Cir., April 11, 2006)) on the Recommended Opinion and Order. Pac-West argued that *Global NAPs* does not affect the Recommended Opinion and Order because its holding deals solely with whether the ISP Remand Order preempted state authority to impose access charges for interexchange VNXX ISP-bound traffic. In addition to discussing the merits of *Global NAPs* and whether it is relevant to our consideration of the matters in this docket, Pac-West pointed out that the decision is not binding in Arizona, which is within the jurisdiction of the Ninth Circuit Court of Appeals."

**Page 7, between lines 7 and 8, insert:**

"In its Supplemental Brief, Qwest addressed the impact of *Global NAPs* on the Recommended Opinion and Order. Qwest argued that *Global NAPs* requires reversal of the Recommended Opinion and Order and quoted extensively from the *Global NAPs* decision as well as the Amicus Brief filed by the FCC in that case. Qwest argued that the *Global NAPs* decision "requires (1) that the term 'ISP-bound traffic' must be read in context and (2), when read in the proper context, that the term 'ISP-bound traffic' refers only to local ISP traffic." Qwest Corporation's Supplemental Brief, p. 11."

**Page 7, line 21, strike:**

"do not read the ISP Remand Order as being", insert "cannot say that the ISP Remand Order is"

**Page 7, between lines 23 and 24, insert:**

"The *Global NAPs* case arose from an arbitration decision issued by the Massachusetts Department of Telecommunications and Energy ("DTE"), which determined that Global NAPs, the CLEC in that case, was required to pay Verizon, the ILEC in that case, access charges for VNXX traffic, including for non-local ISP-bound traffic. It is helpful to note the *Global NAPs*

court's succinct description of the intercarrier compensation debate:

The treatment of intercarrier compensation for ISP-bound traffic has been a matter of considerable debate in recent years. Calls to ISPs tend to be long, and generally go exclusively from the ISP customer to the ISP. This has created opportunities for regulatory arbitrage. For example, in the context of reciprocal compensation, since reciprocal compensation flows from the LEC whose customer makes the phone call to the LEC whose customer receives the phone call, an [sic] LEC with a high proportion of ISP customers – as Global NAPs has – stands to gain a windfall in a reciprocal compensation scheme which includes traffic to an ISP.

*Global NAPs* at 11<sup>1</sup> (citations omitted).

Global NAPs contended that the ISP Remand Order had preempted the DTE's authority to regulate intercarrier compensation for all ISP-bound traffic. Verizon argued that VNXX allowed Global NAPs to engage in regulatory arbitrage. The DTE's decision classified VNXX calls according to the geographic end points of the call, and ordered the parties to work together to determine geographic end points of VNXX calls to facilitate imposition of access charges. Global NAPs challenged the imposition of these access charges on VNXX ISP-bound calls.

In its analysis of the issue, the *Global NAPs* court referred to the FCC's brief as "helpful", saying

that "[i]n some respects, the ISP Remand Order appears to address all calls placed to ISPs" but also that "the administrative history that led up to the ISP Remand Order indicates that in addressing compensation, the [FCC] was focused on calls between dial-up users and ISPs in a single local calling area." Thus [the FCC Amicus Brief] concludes that the ISP Remand Order "*can be read to support the interpretation set forth by either party in this dispute.*"

The FCC further notes that "in establishing the new compensation scheme for ISP-bound calls, the [FCC] was considering only calls placed to ISPs located in the same local calling area as the caller." According to the FCC, "[t]he [FCC] itself has not addressed application of the ISP Remand Order to ISP-bound calls outside a local calling area or decided the implications of using VNXX numbers for intercarrier compensation more generally."

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<sup>1</sup> For ease of reference, *Global NAPs* citations reflect the pagination used in the copy appended to Qwest's Notice of Seventh Filing of Supplemental Authority.

*Id.* at 31-32 (quoting the FCC Amicus Brief) (emphasis added). After careful analysis of the *Global NAPs* decision and the briefs of the parties, we find that the *Global NAPs* court and the FCC's Amicus Brief make more evident the fact that the law remains unsettled, in contrast to Qwest's assertion that these two documents affirm its position, alone. Reasonable minds may differ on the issue of what exactly the FCC meant with its ISP Remand Order. Ultimately, the *Global NAPs* court held that the ISP Remand Order did not preempt state authority to regulate intercarrier compensation for all ISP-bound traffic, but, as Pac-West has pointed out in its Supplemental Brief, this is not dispositive to the resolution of this matter."

**Page 8, lines 16 and 17, strike:**

"on whether, or under what circumstances, the use of VNXX is in the public interest."

**insert** "in the form of a Staff Recommendation to the Commission regarding VNXX. Issues to be addressed by Staff should include what rates are applicable on an ongoing basis; whether VNXX results in misassigned local telephone numbers; and whether VNXX results in misused telephone numbering resources."

**Page 12, line 2, after "recommendations" insert:**

"to the Commission"; after "Virtual NXX" insert ", including what rates are applicable on an ongoing basis; whether VNXX results in misassigned local telephone numbers; and whether VNXX results in misused telephone numbering resources"